IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIME WARNER ENTERTAINMENT CO., L.P.	:	CIVIL ACTION
	:	
v.		
	:	
TRAVELERS CASUALTY & SURETY COMPANY, and PAUL FRIENDSHUH CABLE CONSTRUCTION COMPANY	:	NO. 97-6364

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

November 10, 1998

Presently before this court are plaintiff, Time Warner Entertainment Co., L.P.'s ("Time Warner") motion for summary judgment (Document. No. 13), and defendants, Travelers Casualty & Surety Company ("Travelers") and Paul Friendshuh Cable Construction Company's ("Friendshuh") motion for summary judgment (Document No. 14), both filed July 7, 1998.[1]

I. BACKGROUND

Time Warner and Friendshuh entered into an "Agreement For Construction Of A Cable Television System" on or about October 10, 1994 (the "Agreement"). (Pl.'s Mot. Summ. J. Ex. A.) The Agreement was a form contract drafted by Time Warner. Friendshuh had a commercial general liability policy with Travelers prior to the execution of the Agreement (the

[1] These motions were referred to this court for a Report and Recommendation by the Honorable James McGirr Kelly by Order dated August 25, 1998.

"Policy").[2] Travelers issued an endorsement naming Time Warner as an additional insured under the Policy.

On February 14, 1995, Jerry Riddle ("Riddle") climbed a utility pole and was in the process of splicing cable. At that time, Riddle was an employee of Friendshuh. Riddle was not paid a salary or hourly wage, rather he was paid a certain sum for each foot of cable he installed. (Riddle Aff. ¶19.) Paul Friendshuh noticed that Riddle was not wearing a hard hat and told Riddle he could not work without one. (Riddle Aff. ¶9.) Riddle stopped working and left the job site in his own vehicle to get a hard hat. Riddle intended to return home for his hard hat, but remembered that his son had been playing with it and was unsure of where to find it. (Riddle Aff. ¶¶11, 12, 14, 15.) Riddle instead stopped at the Lower Bucks Cablevision facility (the "Lower Bucks Warehouse") to try to buy or borrow a hat. The Lower Bucks Cablevision Warehouse is owned by Time Warner, and Riddle had worked there in the past. Riddle claims that he went to the Lower Bucks Warehouse not because it was owned by Time Warner and he was working on a Time Warner project, but "because [he] used to work there and knew some of the personnel, it was convenient and [he] believed [he] could buy or borrow a hard hat there." (Riddle Aff. ¶15.)

The personnel at the Lower Bucks Warehouse permitted Riddle onto the premises. Riddle paid ten dollars and was told to retrieve the hard hat himself. (Riddle Aff. ¶18.) Riddle fell and was injured while climbing the shelving unit where the hard hats were stored. (Riddle Aff. ¶18.)

---

[2] Travelers Casualty & Surety Company was then known as Aetna Casualty and Surety.

The issue raised by plaintiff in its underlying declaratory judgment action is whether Travelers is contractually obligated pursuant to the Policy, to indemnify and/or defend, in whole or in part, Time Warner as a result of a settlement in litigation captioned Jerry Riddle and Jeanette Riddle v. Time Warner Entertainment Co., L.P., Civil Action No. 97-0834, in the United States District Court for the Eastern District of Pennsylvania ("Riddle Litigation"). Time Warner claims that as an additional insured under the Policy issued to Friendshuh, it was entitled to a defense and indemnification from Travelers. Travelers refused to provide a defense and indemnity with respect to the Riddle Litigation claiming that "[Travelers does] not see this loss as arising out of the operations of the job site." (Pl.'s Mem. Supp. Summ. J. Ex. G.) Time Warner provided the defense in the Riddle Litigation. Prior to the trial in the Riddle Litigation, a settlement was reached between plaintiff and Time Warner for $250,000. A settlement pool was funded by contributions from both Time Warner and Travelers. Time Warner also moves for summary judgment against Friendshuh for similar damages in the event that this court determines that Friendshuh must indemnify Time Warner pursuant to the terms of the Agreement, including the indemnification provisions.

In their motion for summary judgment, defendants argue that Friendshuh met its contractual obligations under the Agreement by obtaining appropriate insurance coverage. Moreover, they claim that Friendshuh is not liable under the indemnification provisions of the Agreement because the accident did not occur during performance of the work. Defendants contend that Travelers is entitled to summary judgment because Time Warner's liability does not arise out of Friendshuh's work for Time Warner.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides that if "there is no genuine issue as to any material fact . . . , the moving party is entitled to judgment as a matter of law." The moving party bears the burden of showing "that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party sustains its burden, the non-moving party must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992). The "non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact," Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994), or replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. In assessing whether the non-moving party has met its burden, the court must focus on both the genuineness and the materiality of the factual issues raised by the non-movant. An issue is "genuine" only if there is sufficient evidence from which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As to materiality, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. at 248. A factual dispute is only "material" if it might affect the outcome of the case. See id. A dispute over irrelevant or unnecessary facts will not preclude summary judgment. Id.

When considering a motion for summary judgment, the court must draw inferences in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true. See id. at 255.

The court may not make credibility determinations or weigh the evidence. Id. at 252. If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushia Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. DISCUSSION

Pursuant to the Agreement, Friendshuh agreed to "furnish all labor, materials, tools, equipment, temporary facilities, warehousing, supervision, and services necessary to prosecute and complete the construction of aerial and/or underground cable television plant (the "Work")". (Agreement at ¶1.1.) Time Warner was to supply "all cable, hardware, electronic components, power supply installation materials, and other materials or supplies exclusive of tools, vehicles, trailers, safety equipment and other incidental equipment required for performance of the Work." (Agreement Ex. C.) All items supplied by Time Warner were to be warehoused at "200 Rittenhouse Cr. St. 5w Bristol, PA". Id.

The Agreement also contained the following provision, set forth in pertinent part, regarding indemnification:

> ARTICLE 11 - INDEMNIFICATION:
>
> 11.1 To the fullest extent permitted by law, [Friendshuh] shall indemnify, defend, protect, save and hold harmless [Time Warner], its agents and employees, from and against all claims, liability, penalties, damages, actions, losses and expenses arising out of or resulting from the performance of the Work under this Agreement or the failure of [Friendshuh] to perform any obligation of [Friendshuh] under this Agreement, regardless of whether or not it is caused in part by a party indemnified hereunder.

With respect to insurance, the Agreement contained the following provisions, set forth in pertinent part:

ARTICLE 10 - INSURANCE, RISK OF LOSS:

> 10.1 Contractor's Insurance: [Friendshuh] shall maintain and pay for insurance coverage of the types and with the limits set forth herein, ...
>
> 10.1.2 Comprehensive Public Liability Insurance written on a standard liability policy form including: (a) Comprehensive General Liability Insurance covering Premises-Operations, Independent Contractors Products Completed Operations ..., Broad Form Property Damage, and Personal Injury hazards, ...
>
> 10.1.4 [Time Warner] shall be added as additional insured under such policies. ...

As stated above, Friendshuh had a commercial general liability policy with Travelers prior to the execution of the Agreement.[3] The endorsement naming Time Warner as an additional insured (the "Endorsement") states in pertinent part as follows:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> WHO IS INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.
>
> SCHEDULE
>
> NAME OF PERSON OR ORGANIZATION
>
> TIME WARNER ENTERTAINMENT CO. LP

(Defs.' Mem. Supp. Summ. J. Ex. B.)[4]

Time Warner raises several arguments in its motion for summary judgment. Time Warner argues that the employee exclusion provision contained in Exclusion (d) of the Policy is

---

[3] Travelers Casualty & Surety Company was then known as Aetna Casualty and Surety.

[4] Friendshuh met its contractual obligation regarding insurance. Time Warner has conceded that the Endorsement issued by Travelers was sufficient. (Greenberg Dep. at 11-12; Mallia Dep. at 13.)

not applicable in this case. (Pl.'s Mot. Summ. J. at 11-13.) Time Warner also argues at length regarding the significance of the separation of insureds provision of the Policy as it relates to the employee exclusion. (Pl.'s Mot. Summ. J. at 14-23.) It is not necessary for the court to consider these arguments. Defendants do not contend that the employee exclusion provision applies or that the separation of insureds provision works to preclude the relief Time Warner seeks. Rather, defendants argue that Riddle's injury did not arise out of or result from the performance of the Work, as that term is defined in the Agreement, precluding recovery against Friendshuh under the indemnity provisions of the Agreement. Additionally, defendants argue that Riddle's injuries did not arise out of Friendshuh's work for Time Warner precluding recovery against Travelers under the Policy and Endorsement. For the reasons stated below, this court finds that Riddle's injuries did not arise out of or result from the performance of the Work and, therefore, Friendshuh is not liable to indemnify Time Warner under the terms of the indemnification provisions of the Agreement. Further, Riddle's injuries did not arise out of Friendshuh's work for Time Warner and, consequently, Travelers is not liable to provide a defense and indemnify Time Warner under the terms of the Policy and Endorsement.

A. <u>Summary Judgment Should be Granted in Favor of Defendant Friendshuh</u>

Article 11 of the Agreement required Friendshuh to indemnify Time Warner for all claims "arising out of or resulting from the performance of the Work . . . regardless of whether or not it is caused in part by [Time Warner]." Both Time Warner and Friendshuh agree that this language meant that Friendshuh would have to indemnify Time Warner in regard to liability caused by Friendshuh's performance of the Work under the Agreement. (Greenberg Dep. at 8; Friendshuh Aff. ¶5.)

Defendants rely upon two helpful cases: Czajhowski v. City of Philadelphia, 537 F. Supp. 30 (E.D. Pa. 1981), aff'd, 688 F.2d 819 (3d Cir. 1982) (table), and Hershey Foods Corp. v. Gen. Elec. Serv. Co., 422 Pa. Super. 143, 619 A.2d 285 (1992), allocatur denied, 536 Pa. 643, 639 A.2d 29 (1993) (table). In Czajhowski, the City of Philadelphia sought indemnity from Ogden Food Service, the employer of a food and beverage concession worker who was injured when he fell on outside steps at the City owned Civic Center where the concession was located. The staircase had no connection to the injured employee's work or to the concession. 537 F. Supp. at 31. The concession contract provided the following with respect to indemnification:

> The concessionaire shall also indemnify and hold harmless the Philadelphia Civic Center and the City of Philadelphia from any and all liability or loss of any nature whatsoever arising out of or relating to the concessionaire's occupancy of the premises and operation of the facilities including, without limiting the generality of the foregoing coverage, any act or omission of the concessionaire, its agents, employees or invitees.

The contract also provided:

> Licensee covenants and agrees to fully indemnify, protect and save harmless Licensor, . . . from any and all claims, . . . for damages for injuries to persons or damage to property suffered or incurred by any person or persons and arising from, growing out of or caused by the exercise by Licensee of the privileges granted herein.

Id. (emphasis added.) The court concluded that even if it were to find in the language of the concession contract that the City was indemnified for its own acts and omissions[5], the court would not find such indemnification applicable because the "fall cannot be considered a loss

[5] Considering the language of the indemnification provision, the court concluded that Ogden Food Services had agreed "only to indemnify the City for the acts or omissions of itself (Ogden), and not of anyone else, including the City." The language of the indemnification provisions of the Agreement in the instant matter specifically states that Friendshuh's obligation to indemnify arises "regardless of whether or not [the claims, etc . . . were] caused in part by [Time Warner]."

'arising out of or relating to the concessionaire's occupancy of the premises and operation of the facilities' or 'arising from, growing out of or caused by the exercise by the Licensee of the privileges . . . granted' merely because plaintiff worked for the concessionaire at the Civic Center and the fall occurred on the outside steps of the Civic Center." Id. at 32.

In Hershey, General Electric Service Corporation ("GESCO") contracted to perform the following "Work" as defined in the relevant contract, "electrical work throughout the plant as required by the engineering departments." 422 Pa. Super. at 146, 619 A.2d at 287. Under the contract, GESCO agreed to indemnify Hershey Foods Corporation ("Hershey") for "all claims, damages, losses and expenses . . . arising out of or resulting from the performance of the Work". An electrical contractor was killed at the job site while eating lunch. The employee sat on a conveyor which activated a pallet freight elevator, and he was killed when struck in the head by a cross bar located at the top of the elevator shaft. 422 Pa. Super. at 147, 619 A.2d at 287. The employee's work did not require that he use the elevator and he was not instructed in its use. 422 Pa. Super. at 146, 619 A.2d at 287. As to whether the employee's death and injury arose out of the "performance of the Work," the court concluded that the contract language was ambiguous in this regard. Hershey urged the court to consider cases involving claims for benefits under the Workmen's Compensation Act which provides broad coverage for "injury to an employee . . . arising in the course of his employment." 77 Pa. Cons. Stat. Ann. §411(1). The court noted that "[t]he factual situations which have been included within the Act's definition of 'course of employment' are broad and diverse." 422 Pa. Super. at 151, 619 A.2d at 290 (citations omitted). In contrast, the contract between Hershey and GESCO did not use the language contained in the Workmen's Compensation Act, but used the language "arising out of or resulting from the

performance of the work." Id. The court stated that the contract specifically defined the "Work" as electrical work and found that the employee was not in the process of performing electrical work when the accident occurred. 422 Pa. Super. at 151, 152, 619 A.2d at 289, 290. The court rejected Hershey's argument that the employee's lunch break was merely a minor deviation for the course of employment. The court further concluded that the contract was ambiguous with regard to whether the employee's death arose out of the performance of the electrical work, construed the contract against the drafter, Hershey, and dismissed Hershey's indemnification claim. 422 Pa. Super. at 148, 152, 619 A.2d at 288, 290.

In the instant matter, Time Warner also urges this court to consider cases interpreting the term "course of employment" under the Workmen's Compensation Act. As in Hershey, the language in the Agreement's indemnification provision contains the language "arising out of or resulting from the performance of the Work", and is different from that in the Workmen's Compensation Act. The Workmen's Compensation Act cases, therefore, are distinguishable.

Time Warner argues that the Czajhowski and Hershey cases are distinguishable from the present situation. Time Warner contends that when the worker in Czajhowski was injured on an outside staircase, he was not performing his work of selling food and beverage inside the building. In the instant matter, Time Warner contends that Riddle was following his employer's directive to obtain a hard hat, which act was in the furtherance of Friendshuh's business. As to Hershey, Time Warner agrees that the employee in Hershey was not performing electrical work when he was eating his lunch. In the instant matter, Time Warner argues that

Riddle was "not on a frolic from work." Rather, Riddle was ordered to get a hard hat which was required by the terms of the Agreement.

Here, it appears that Mr. Riddle's injuries were caused by the condition of the shelving at the Lower Bucks Warehouse, or some other condition existing at the Lower Bucks Warehouse, where he went to obtain a hard hat. This court cannot find any connection between the condition of the Lower Bucks Warehouse and the Work as defined in the Agreement. Time Warner argues that because the Agreement required Friendshuh to perform the Work in a safe manner, complying with applicable regulations, and Mr. Riddle was obtaining a hard hat at the direction of Mr. Friendshuh in compliance with the safety requirements of the Agreement, his injuries occurred during the performance of the Work under the Agreement. Most of the cases cited by Time Warner in its pleadings, however, involve injuries to contractors' employees which occurred at the job site while the work was in progress. Here, Riddle had been ordered to stop work, and to leave the job site. At that point, it was up to Riddle to obtain a hat and to return to work. Mr. Friendshuh did not direct Riddle to get a hat at the Lower Bucks Warehouse. Riddle could have gone anywhere to get the hat. It was mere happenstance that Riddle went to another Time Warner facility to obtain a hat. Moreover, Riddle was not being paid while he went to obtain a hat.[6] Accordingly, this court finds that Riddle's injuries did not arise out of or result from the performance of the Work as defined under the Agreement, and consequently,

---

[6] Time Warner asserts that "Defendant would have us believe that Mr. Riddle was totally divorced from his work and roaming the community free as a lark exercising his free will in casual pursuit of a fashion accessory." (Pl.'s Answer to Defs'. Mot. for Summ. J. at 9.) This assessment, however, fairly depicts the facts in this case. Riddle was free to go where ever he chose to obtain a hat. He was under no time constraints to return to work, other than his own desire to be paid. He could have gone home, to any store, or to a friend's house. This case is before this court simply because he chose to go to another Time Warner facility.

Friendshuh is not obligated to indemnify Time Warner under the terms of the Agreement.[7] With respect to Friendshuh, defendants' motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

B. Summary Judgment Should be Granted in Favor of Defendant Travelers

"Interpretation of an insurance policy is a question of law." State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 549 Pa. 518, 522, 701 A.2d 1330, 1331 (1997). See also Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh v. Nat'l Union Fire Ins. Co. of Pittsburgh, 709 A.2d 910, 912 (Pa. Super. 1998) (construction of a contract of insurance is a question of law); Nationwide Mut. Ins. Co. v. Nixon, 453 Pa. Super. 70, 75, 682 A.2d 1310, 1313 (1996) ("[T]he proper construction of a policy of insurance is a matter of law which may properly be resolved by a court pursuant to a motion for summary judgment."), allocatur denied, 548 Pa. 619, 693 A.2d 589 (1997) (table). "[W]hen resolving a contract dispute, the initial determination is whether the contract is ambiguous." Pittson Co. Ultramar Am. Ltd v. Allianz Ins., 124 F.3d 508, 521 (3d Cir. 1997) (quoting Sumitomo Mach. Corp. of Am., Inc. v. AlliedSignal, Inc., 81 F.3d 328, 332 (3d Cir. 1996)). In making that determination, the court must decide whether the contract is "susceptible of more than one meaning." Id. Whether a provision of an insurance policy is ambiguous is a question of law to be decided by the courts. Ryan Homes, Inc. v. The Home Indem. Co., 436 Pa. Super. 342, 347, 647 A.2d 939, 941 (1994), allocatur denied, 540 Pa. 621, 657 A.2d 491 (1995) (table). "Where the language of an insurance

[7] If this court were to find that the language of the indemnification provisions of the Agreement is ambiguous as to whether Riddle's injuries arose out of or resulted from the performance of the Work, the language of the Agreement would have to be construed against the drafter, Time Warner, and Time Warner's indemnification claim would fail.

policy is clear and unambiguous, it must be given its plain and ordinary meaning." 12th Street Gym, Inc. v. General Star Indem. Co., 93 F.3d 1158, 1165 (3d Cir. 1996). As the Third Circuit Court of Appeals recently explained:

> But "[w]hen the terms of an insurance contract are clear, . . . it is the function of a court to enforce it as written and not make a better contract for either of the parties." Thus, as we have explained, a court must not "torture" the language of a contract to create ambiguity where none exists. "[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of ambiguity, a court should not engage in strained construction to support the imposition of liability."

Pittson Co. Ultramar, 124 F.3d at 520 (applying New Jersey law) (citations omitted).

According to the language of the Endorsement, Time Warner was added as an insured "but only with respect to liability arising out of [Friendshuh's] work for [Time Warner]." With respect to the Policy, the issue before the court is whether Mr. Riddle's injuries arose out of Friendshuh's work for Time Warner.[8] According to the language of the Agreement, the "Work" to be performed by Friendshuh "includes the installation of cable television plant for those projects identified by the Owner. ... The Work may include construction of new plant, overlash and rebuilding and/or upgrading of existing plant, as more particularly described in the Notice to Proceed." (Agreement at ¶1.1.)

The parties agree that the phrase "arising out of" in additional insured endorsements has been interpreted to require "but for causation" rather than "proximate cause." Pennsylvania Turnpike Comm. v. Transcontinental Ins. Co., 1995 U.S. Dist. LEXIS 11089 (E.D.

[8] This court need not consider whether Time Warner is insured under the Endorsement for matters related to its own negligence. Assuming that it is, the issue still remains whether the injuries to Riddle arose out of Friendshuh's work for Time Warner.

Pa. Aug. 7, 1995) (construing an additional insured endorsement identical in pertinent part to the one in the instant matter). The Court of Appeals has stated as follows with respect to this issue:

> Fortunately, there is a Pennsylvania Supreme Court decision directly interpreting the meaning of the clause "arising out of and in the course of the employment." In McCabe v. Old Republic Insurance Co., 425 Pa. 221, 228 A.2d 901 (1967), McCabe, the employer, sought to recover from the insurer part of the judgment McCabe was required to pay when one of its employees was injured in the construction of a trench. The policy excluded from coverage liability on the part of McCabe for injuries or death of an employee "arising out of and in the course of his employment by the insured."
>
> McCabe, . . . attempted to argue that this term was ambiguous. The Supreme Court rejected that contention, holding instead that "[w]e cannot agree that any ambiguity exists." Id. 228 A.2d at 903. The Court held that "'arising out of [']means causally connected with, not proximately caused by. 'But for' causation, i.e., a cause and result relationship, is enough to satisfy this provision of the policy." 425 Pa. at 224, 228 A.2d at 903 (emphasis deleted) (quoting Manufacturers Casualty Ins. Co. v. Goodville Mut. Casualty Co., 403 Pa. 603, 607-08, 170 A.2d 571, 573 (1961)).

Forum Ins. Co. v. Allied Sec., Inc., 866 F.2d 80, 82 (3d Cir. 1989). In Forum, the insurer, Forum Insurance Co., brought suit for declaratory judgment against the employer, Allied Security, Inc., and others, seeking a declaration that it had no obligation to provide defense or coverage of an employee estate's claim against the employer. In that case, one employee attacked and killed a fellow employee while they both were on assignment for their employer, Allied. Id. at 80. Allied conceded that both the victim and his assailant were at work at the time of the attack. Thus, the Court of Appeals agreed with the district court that "[the victim's] death clearly arose out of his employment under Pennsylvania law, since he was killed by a fellow employee while both were on assignment as security guards for their employer." Id. at 83.

In Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co., 403 Pa. 603, 170 A.2d 571 (1961), Manufacturers Casualty sought to impose liability on Goodville under an automobile

insurance policy issued by Goodville. Under the policy, "Goodville contracted to 'pay on behalf of the insured all sums which the insured shall become legally obligated to pay' for damages 'caused by accident and arising out of the ownership, maintenance or use' of the automobile or trailer." Id. 403 Pa. at 605, 170 A.2d at 572. The Pennsylvania Supreme Court stated as follows:

> When provisions of an insurance policy are vague or ambiguous, they must be construed strictly against the insurer and liberally in favor of the insured. Had the insurer desired to limit its liability to accidents with such a close causal connection to the ownership, maintenance or use of the trailer as to be encompassed within the scope of proximate causation, it could have and should have so stated in the policy. Construed strictly against the insurer, "arising out of" means causally connected with, not proximately caused by. "But for" causation, i.e., a cause and result relationship, is enough to satisfy this provision of the policy. Unquestionably the trailer was in "use" at the time of the accident, since it was being used for the very purpose of its existence, viz, to transport a horse. But for the fact of it being so used on this occasion, O'Malley's automobile would not have collided with it.

Id. 403 Pa. at 607-08, 170 A.2d at 573.

The analysis of "but for" causation is not without limitation. Here, according to the language of the Endorsement, Time Warner was added as an insured "but only with respect to liability arising out of [Friendshuh's] work for [Time Warner]." The court in Pennsylvania Turnpike recognized that the phrase "but only with respect to liability arising out of 'your work' for that insured by or for you" does have a "limiting effect". 1995 U.S. Dist. LEXIS 11089, at *24. Courts have read this "but only" language to prevent the additional insured from "enjoying blanket coverage under the policy for liability unrelated to the work." Id. at *25 (citing Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co., 721 F. Supp. 740, 743 (E.D. Pa. 1989)). The court in Pennsylvania Turnpike likewise found the phrase "but only ... your work" to mean that there is no coverage for liability unrelated to the insured's work. Id.

Another limitation is set forth in United States Underwriters Ins. Co. v. Liberty Mut. Ins. Co., 80 F.3d 90 (3d Cir. 1996). In that case, an individual slipped on a pool of grease in a parking lot as he got out of his car. The court, considering the Pennsylvania Motor Vehicle Financial Responsibility Law, concluded that the injuries suffered did not arise out of the maintenance or use of the vehicle. The court acknowledged that but for causation was enough to satisfy the requirement of the "arising out of" language, 80 F.3d at 93-94, however, it further concluded that

> [i]n assessing whether the necessary causal nexus exists, we could -- as the parties wish -- struggle with the legal equivalent of angels and pinheads. For example, the vehicle obviously was, in a sense, a cause of the accident: [the injured party] was alighting from the car when he fell; the car was a part of the stream of events that lead to his injury. Viewing causation in these terms, however, makes it essentially all-encompassing ...
>
> It is a matter of hornbook tort law that every incidental factor that arguably contributes to an accident is not a "but for" cause in the legal sense. ... The cause of [the injured party's] injury was the fact that he slipped on grease, and all the clever arguments of skilled legal advocates cannot alter this central event. It was "mere fortuity" that [the injured party] was still partially in his car when he slipped.

Id. at 94, 95.

The instant case is factually distinguishable from Forum and Manufacturers Casualty. In Forum, the victim and his assailant were in the course of their employment when the attack occurred. In Manufacturers Casualty, the trailer was clearly being "used" for its expected purpose. Here, Riddle was not performing work for Friendshuh when he fell and was injured at the Lower Bucks Warehouse; Friendshuh did not direct Riddle to get a hat at the Lower Bucks Warehouse. Riddle was not being paid during this time. Riddle was told to leave

the job and not to return without a hat. Riddle left the job site in his own vehicle. At that point, Riddle could have decided not to get a hat and never to return to the project. It was "mere fortuity" that Riddle chose to go to the Time Warner Lower Bucks Warehouse instead of his home to get a hat. As to Travelers, defendants' motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

Accordingly, for all of the above reasons, this court makes the following

R E C O M M E N D A T I O N

AND NOW, this 10th day of November, 1998, it is respectfully recommended that defendants' motion for summary judgment be granted and plaintiff's motion for summary judgment be denied.

BY THE COURT:

_____

THOMAS J. RUETER
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIME WARNER ENTERTAINMENT CO., L.P.	:	CIVIL ACTION
	:	
v.		
	:	
TRAVELERS CASUALTY & SURETY COMPANY, and PAUL FRIENDSHUH CABLE CONSTRUCTION COMPANY	:	NO. 97-6364

O R D E R

AND NOW, this day of , 1998, upon consideration of plaintiff's motion for summary judgment (Document No. 13) and defendants' motion for summary judgment (Document No. 14), and all other pleadings related thereto, and after careful review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, it is hereby

ORDERED

1. The Amended Report and Recommendation is APPROVED and ADOPTED.

2. Defendants' motion for summary judgment is GRANTED.

3. Plaintiff's motion for summary judgment is DENIED.

BY THE COURT:

_____
JAMES McGIRR KELLY, S.J.